

72938-1

No. 92897-5

72938-1

COURT FILED  
STATE OF WASHINGTON  
2018 MAR -6  
4:00

No. 72938-1-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

---

In re the Custody of:

LMS,

FAUALUGA SIUFANUA AND BILLIE SIUFANUA,

Appellants,

and

TONY SAMOA FUGA and

LISA LYNETT SIUFANUA,

Respondents.

---

APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY

---

BRIEF OF RESPONDENT

---

Philip C. Tsai, WSBA #27632

TSAI LAW COMPANY, PLLC  
 2101 4th Avenue, Suite 2200  
 Seattle, WA 98121  
 Phone: (206) 728-8000  
 Fax: (206) 728-6869

Attorneys for Respondent, Tony Samoa Fuga

## TABLE OF CONTENTS

<b>I. INTRODUCTION</b> .....	1
<b>II. STATEMENT OF ISSUES IN RESPONSE</b> .....	1, 2
<b>III. STATEMENT OF THE CASE</b> .....	2
<b>IV. ARGUMENT</b> .....	16
A. Standard Of Review .....	16
B. The United States Constitution Protects A Biological Parents’ Right To Have Custody And Raise Their Children. ....	18
C. The Court Properly Denied Adequate Cause Pursuant To RCW 26.10.032 And Dismissed The Grandparents Petition For Non Parental Custody .....	28
D. The Trial Court Properly Found That Respondent Was A Fit Parent When Denying The Grandparents’ Non Parental Custody Petition .....	37
E. The Court Property Denied The Grandparent’s Request for Appointment of A Guardian ad Litem when Denying Adequate Cause and Dismissing the Petition .....	39
F. The Court Should Award Respondent His Attorney’s Fees Pursuant To 26.10.080 And Rap 18.1 .....	41
<b>V. CONCLUSION</b> .....	42
<b>VI. APPENDIX</b> .....	45

## TABLE OF AUTHORITIES

### CASES

<u>Granville v. Troxel</u> , 530 U.S. 57, 120 S.Ct 2054 (2000). .....	18
<u>In re Marriage of Allen</u> , 28 Wn.App. 637, 626 P.2d 16 (1981) .....	20, 21, 24, 35
<u>In re Custody of A.F.J.</u> , 179 Wn.2d 179, 314 P.3d 373 (2013).....	30,31
<u>In re Custody of Anderson</u> , 77 Wn.App. 261, 890 P.2d 525 (1995).....	24, 25, 26, 32
<u>In re Custody of B.M.H.</u> , 179 Wn.2d 224, 315 P.3d 470 (2013) ..	20, 21, 22, 23, 24, 31, 35
<u>In re Marriage of Caven</u> , 136 Wn.2d 800, 966 P.2d 1247 (1998) .....	38
<u>In re Custody of C.C.M.</u> , 149 Wn.App. 184, 202 P.3d 971 (2009) .....	21
<u>In re Custody of E.A.T.W.</u> , 168 Wn.2d 335, 227 P.3d 1284 (2010).....	19, 21, 23, 28
<u>In re Custody of J.E.</u> , No. 32062-6 Court of Appeals Division III .....	34, 35
<u>In re Custody of S.C.D-L.</u> , 170 Wn.2d 513, 342 P.3d 918 (2010).....	26, 28
<u>In re Custody of Stell</u> , 56 Wn.App. 356, 783 P.2d 615 (1989).....	17, 24, 40
<u>In re Custody of T.L.</u> 165 Wn.App. 268, 280, 268 P.3d. 963 (2011). .....	18
<u>In re Marriage of Schneider</u> , 82 Wn.App. 471, 918 P.2d 543 (1996).....	17
<u>In re Parentage of J.A.B.</u> , 146 Wn.app. 417, 191 P.3d 71 (2008).....	31
<u>In re Parentage of Schroeder</u> , 106 Wn.App. 343, P.3d 132 (2001).....	17
<u>In re Custody of Shields</u> , 157 Wn.2d 126, 136 P.3d 117 2006).....	20, 21, 23, 28
<u>In re Marriage of Maughan</u> , 113 Wn.App. 301 53 P.3d 535 (2002).....	19
<u>Parham v. J.R.</u> , 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979).....	20, 24

<u>Skinner v. Oklahoma ex rel. Williamson</u> , 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) .....	18
<u>Stanley v. Illinois</u> , 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) .....	18

### **Constitutional Provisions**

U.S. Const. amend. XIV, §1 .....	18
U.S. Const. amend. IX .....	18

### **Statutes**

RCW 26.10 .....	1, 4
RCW 26.10.030 .....	1
RCW 26.10.070 .....	38
RCW 26.10.130 .....	42
RCW 26.10.032 .....	21, 24, 31
RCW 26.10.080 .....	42

### **Rules**

RAP 18.1 .....	42, 43
----------------	--------

## **I. INTRODUCTION**

This case involves a trial court's decision to dismiss the maternal grandparents' non parental custody petition and to allow a biological father to be the primary parent of his 9 year old daughter. On November 14, 2014 the trial court denied a finding of adequate cause and dismissed the maternal grandparents' non parental custody action pursuant to RCW 26.10.030. The trial court specifically found that the father, Tony Fuga, was a fit parent and that there would be no actual harm to her growth and development to allow her to primarily reside with her father.

The trial court also found pursuant to the father's Petition for Modification in the Paternity action that the biological mother, Lisa Siufanua, was not a fit parent when making the determination that it was in the best interests of the child to relocate to California where the father resided with his current wife and two young children. The maternal grandparents have appealed the trial court's dismissal of their RCW 26.10 Non Parental Custody Petition.

## **II. STATEMENT OF ISSUES IN RESPONSE**

1. Did the trial court properly deny adequate cause and dismiss the maternal grandparents' non parental custody petition when the biological father was a fit parent with insufficient basis for restrictions against him and the evidence did not establish that awarding custody to the father would cause actual harm to the child's growth and development?

2. Did the trial court properly deny the appointment of a Guardian ad Litem when the trial court ordered a home study and because there was no adequate cause to proceed with the petition, there would be no open case?

### **III. STATEMENT OF THE CASE**

The Respondent, Tony Samoa Fuga (hereinafter, “Tony”) and the Respondent, Lisa Siufanua (hereinafter, “Lisa”) were involved in an intimate relationship beginning in 2004.<sup>1</sup> LMS was born to Tony and Lisa in December of 2005. (CP 198.) For the first approximately three years of LMS’s life, the parties resided together at Lisa’s parents’, Billie Siufanua and Faualuga Siufanua (hereinafter, “grandparents”) residence, and both Tony and Lisa provided parenting functions for their daughter. (CP 247). After approximately three years, Tony and Lisa separated, but Tony continued to spent time with LMS and supported her by providing Lisa with cash, clothing and diapers. (CP 199).

Eventually, Tony moved from Washington to California to enhance his employment opportunities. (CP 203). He met his current wife, Vaelua, in San Diego where they were married. Tony and Vaelua are both employed at the San Diego Naval Base. (CP 203). They have two children of their marriage, ages 4 and 5. (CP 203).

---

<sup>1</sup> The first names are being used for ease of reference. No disrespect is intended.

Tony and Vaelua attended and graduated from IT Technical school and have their certification in computers. (CP 203). Their five year old son attends kindergarten at O'Farrell Elementary School and is very interested in sports and gaming. (CP 204). Tony's 4 year old son also attends O'Farrell Pre School and likes to watch action movies and play games. (CP 204). Tony's family is very active including attending programs through their church where Vaelua's father is a pastor. (CP 234). Tony and his wife research where local family activities are scheduled at at no or low cost and attend those functions with their children. (CP 204).

Tony and his wife, Vaelua have a loving relationship. (CP 204). Tony has never shown any violent tendencies towards Vaelua or anyone else. (CP 234). Tony has great relationships with his co-workers and the parties' extended family on both sides. (CP 234). Vaelua keeps Tony grounded and is very supportive of him. (CP 204). They listen to music and attend church together. (CP 204). Vaelua's dream is to be a school teacher and her parents live close by and are very supportive of their family. (CP 204). Vaelua has a natural and genuine love for children. (CP 204). Tony and Vaelua have been active at the children's school and have attended field trips with them as parent chaperones. (CP 204-05).

They enjoy those times immensely watching their children learn and succeed in school. (CP 205). Tony and Vaelua work opposite shifts so they can balance their time together and a parent is always with their children. (CP 234).

Tony is very fond of the children's school's sticker program where the children will receive a sticker if they behave and display kindness to their teacher and classmates. (CP 205). It is the highlight of Tony's day to come home from work and hear that his children received a sticker. (CP 205).

Tony lives a very peaceful life with his wife and children. (CP 199, 233). Neither Tony nor his wife drink alcohol or are interested in any activities that do not involve their children. (CP 205, 234). Tony and Vaelua live a very child centered life.

While Tony's family life is nice, he always missed his daughter LMS, and wished every day of his life that she was also a part of his happiness. (CP 205). Not a day would go by that he would not think about his daughter LMS and how empty his heart was without her being a greater part of his life. (CP 205).

Over the years that Tony moved to California, he continued to support LMS. (CP 203). Specifically, even after Tony moved from Lisa's

parents' residence, he remained in contact with Lisa and LMS and made sure he supported LMS with money for diapers, food and anything she needed. (CP 206). Once Tony moved to San Diego and was employed, he paid child support to Lisa for the benefit of LMS through the state of Washington Division of Child Support. (CP 206-207). When Tony changed employers, he called the DCS to notify them of his new employment. (CP 206-207).

Tony's mother and step-father, Ty Tufono and Chris Chaussee, were also in a close and supportive relationship with Lisa and LMS. (CP 207). Tony's parents would pick LMS up at the McDonalds in Federal way on the weekends and keep her from Friday to Sundays on an every other weekend basis. (CP 207). Tony's parents continued to help Lisa with LMS in addition to helping Lisa move away from her parents' residence and get a place of her own with LMS. (CP 207). Lisa moved into an apartment with LMS with a friend who had two young children. (CP 249). Tony's parents circulated a Christmas card in 2009 with a picture of them and LMS. (CP 249). Lisa lived with LMS and her boyfriend in their own apartment in Federal Way after moving from Des Moines. (CP 249). This included Tony's parents helping Lisa with

money for rent, clothing and food for her and LMS on a weekly basis. (CP 207).

Eventually, Lisa stopped communicating with Tony and his parents regarding LMS. (CP 249). Tony's mother went to the apartment that Lisa was residing with LMS but discovered that Lisa had been evicted. (CP 207). Tony's mother also went to a residence in Burien that she used to pick LMS up from but the family who resided there indicated they had not seen Lisa nor LMS for months. (CP 207). Lisa's phone number was disconnected and the cell phone numbers for Lisa's parents no longer worked. (CP 208).

In July of 2012, Lisa brought LMS to San Diego for vacation. (CP 208). Lisa brought LMS to Tony's grandmother's house. (CP 208). When Tony arrived at his grandmother's house to see LMS, she ran and leaped into his arms hugging him and crying, "Daddy, Daddy" telling Tony that she missed him. (CP 234-35). LMS never left Tony's side during the entire visit. (CP 235). She clung to Tony and asked him numerous questions such as, "what's your favorite color Daddy?" and "What's your favorite foods?". (CP 235). Vaelua noticed how much LMS looked like her oldest son, Jordon. (CP 235). She also noticed during this visit how much love there was from LMS to Tony and from

Tony to LMS. (CP 235). After Lisa left with LMS, a few moments later, LMS called Tony on his phone just so she could hear his voice again. (CP 235). Tony promised that he would see her again soon and that she could call him anytime. (CP 235).

Tony and his wife had a good talk with Lisa and they all exchanged phone numbers. (CP 208). Tony told Lisa to let him know if there was ever anything that she needed for LMS to please call. Lisa said okay. The very next day, Tony tried to call Lisa on the phone number that she provided but the number was disconnected. (CP 208). Tony was unable to contact her or find either Lisa or LMS. (CP 208).

Tony denies a history of acts of domestic violence towards Lisa or anyone else as alleged by the grandparents. The incident that resulted in his arrest occurred in April of 2005, before LMS was born. (CP 198). Tony and Lisa got into a verbally loud argument at the airport. (CP 198). Although the police report makes clear that Lisa explained to the security guards that Tony had not physically assaulted her in any way, he was arrested and charged with 4<sup>th</sup> degree assault. (CP 198). Tony agreed to domestic violence behavioral therapy and on November 21, 2006, the case was dismissed. (CP 199). Lisa and Tony continued to live together after

this incident for over three years with LMS. (CP 199). Tony did not have any further criminal charges in either Washington or California. (CP 199).

It should be noted, however, that Tony described an incident where appellant, Faualuga Siufanua, assaulted Tony in 2008 when Tony was living with Lisa at her parents' residence. (CP 208). Tony described an incident where, Mr. Siufanua, punched Tony in the face when he brought some of Tony's belongings over to Tony's cousin's place after Lisa and Tony separated. (CP 208). In fact, appellant, Faualuga Siufanua, threatened to kill Tony or have him killed if he came around Lisa or LMS. (CP 248). This was very frightening to Tony as he was young, confused about life and he feared for his safety because appellant, Faualuga Siufanua is described as a big man with a bad temper. (CP 248). For Tony, contacting Lisa or LMS at Lisa's parents' house was out of the question due to Lisa's father's threats, which Tony believed he was capable of following through on. (CP 248).

Tony lost contact with Lisa when she moved without leaving a forwarding address. (CP 199). Tony and his parents were not able to contact Lisa or LMS either. (CP 199). The claim by the grandparents that LMS has always lived with them at their residence is false. LMS lived with Lisa in different locations after Tony and Lisa separated which has

been shown by Tony's parents picking up LMS at Lisa's residence, separate and apart from the grandparents' house. (CP 207). Tony never abandoned LMS, he just did not know how to find or get into contact with LMS after Lisa repeatedly cut off contact. (CP 199).

While LMS was in the care of Lisa's parents, she was not performing well in school. (CP 250). As of March 10, 2014, LMS had been absent 17 days and tardy 19 days. (CP 278).

There were specific letters written by the principal of LMS's school expressing the concern that LMS had been absent and tardy on so many occasions and that it was seriously impacting LMS's learning. (CP 279). Specifically, the letter states as follows:

**February 27, 2014**

**RE: Attendance for [LMS]**

**In reviewing attendance records for [LMS], I have become quite concerned with history of absences and tardies. These multiple absences from school are seriously impacting [LMS] learning experience at Adelaide.**

**There are a number of reasons why excessive absences and tardies concern us:**

- **Teachers plan a full day of instruction that begins promptly at 8:50 a.m. When students arrive late or don't come at all, they miss important information and learning.**

- **We want to prepare our students for their future. Positive habits of punctuality and consistent attendance will benefit them in their future lives and careers.**
- **School district policy emphasizes the importance of prompt arrival when it states that three tardies are equal to one absence.**
- **They miss breakfast service at school and may be starting their day with out breakfast, which can impact learning.**

**I ask you to discuss with your child the importance of being at school every day and arriving on time. The best outcome for students occur when parents and school staff work together to set reasonable expectations, and then do whatever it takes to help students meet them. I look forward to working with you on this issue. Don't hesitate to call me if you have any questions or information to share.**

**Sincerely,**

**Ann Gray, Principal**

...

(CP 279).

Tony expressed concern that LMS was having excessive absences and tardies and that this was having a detrimental impact on her education.

(CP 250). Tony indicated he would be able to make sure LMS was arriving to school on time and that she would be ready to learn. (CP 250).

Tony also expressed concern that LMS was being left alone unsupervised by adults when Lisa's parents were caring for LMS due to their employment, which required them to work in the evenings. (CP

251). Also, Tony advised the trial court that there were numerous other children living in Lisa's parents' residence who arguably have serious emotional issues, similar to Lisa's emotional issues. (CP 251).

### **Procedural History**

On September 5, 2012, a Judgment and Order Determining Parentage was entered with the Court confirming that Tony is LMS's biological father. (CP 215). In the Order, Lisa was determined to be LMS's primary parent and reserved the issue of Tony's residential time to a future determination. (CP 216-17).

On October 8, 2014, after discovering that Lisa was incarcerated and was suspected of using illegal drugs, Tony filed a Petition to Modify the Order Determining Parentage, specifically asking the Court to find adequate cause to modify the Order and designate him as LMS's primary parent. (CP 198).

On October 24, 2015, with full knowledge of Tony's Petition for Modification of Parenting Plan and his counsel of record, Appellant grandparents filed a Non Parental Custody Petition and Obtained an Ex-parte Restraining Order preventing Tony from having contact with his daughter. (CP 198). The Ex-parte Restraining Order did not provide a

mechanism for Tony to see his daughter, even in a supervised capacity. (CP 227-30).

On October 29, 2014, Tony accepted service of the grandparents' Summons, Petition for Non Parental Custody, and the Motion and Ex-parte Restraining Order setting a return Show Cause hearing date of November 10, 2014. (CP 8).

On October 30, 2014, Tony filed a Response to the grandparents' Petition specifically denying that (1) he was not a suitable custodian of his daughter, (2) he had abandoned his daughter; and (3) that he had engaged in a history of acts of domestic violence or assault. (CP 19). Tony also specifically advised in his Response that LMS had lived with Lisa apart from the grandparents, addressing their false contention that LMS had "been living with the petitioner's for her entire life". (CP 20). Tony specifically requested that the Court dismiss the Petition for Non Parental Custody and that custody of LMS be awarded to him. (CP 20). He further asked the Court to enter a restraining order against the grandparents from disturbing his peace. (CP 20).

Also on October 30, 2014, Tony filed a Motion to Dismiss the Non Parental Custody proceeding based on the fact that there was no adequate cause to proceed with the action. (CP 189-96). In his declaration in

support of the motion, Tony specifically described the care and support that he had provided to LMS. (CP 199). He advised the court regarding why he was a fit parent and it would be in LMS's best interests for the Court to place his daughter in his custody. (CP 197-200).

On November 7, 2014, the grandparents filed their response to Tony's motion. In their response, the grandparents did not identify any special need of the child either physical or psychological that they were concerned about if Tony were to be granted custody. (CP 52-57). They only made allegations against Tony and described generally the care they provided for LMS. (CP 54-56). The grandparents did not describe whatsoever any specific detriment or actual harm that would occur to LMS if the Court were to grant custody to Tony. (CP 52-57).

On November 14, 2014, a Pro Tem Court Commissioner determined that the grandparents did not meet their burden of proof to show that Tony was either an unfit parent or that placing LMS with him would cause actual harm to her growth and development should LMS be placed in his custody. (CP 58-61). More specifically, the Order Denying Adequate Cause states:

#### **2.4 Adequate Cause Finding**

**[X] Adequate cause for hearing the petition has not been established.**

**2.5 See Attached. ...**

**...The mother is currently not a fit parent to parent the child.**

**There is no evidence that the father is an unfit parent. He is willing and able to take custody of the child and has not abandoned the child. The child has a relationship with the father and thinks of the father as her father.**

**There has been no showing of actual harm that would occur with the child in the father's custody. He has a stable home and is parenting two other children who are doing well.**

(CP 61).

After the Court denied adequate cause, the grandparents filed a Motion for Revision which was heard by the Honorable Suzanne R. Parisien. (CP 174-175). Judge Parisien denied the motion for revision, also finding that the grandparents had not met their burden of proof to show that either Tony was unfit or that placement of LMS with him would cause actual harm to her growth and development. (CP 169-170). At the hearing on revision, Judge Parisien, in part, stated:<sup>2</sup>

**This is a third party custody case.**

...

---

<sup>2</sup> A copy of the hearing before Judge Parisien's and her oral ruling is being supplied as Appendix I to this Brief.

**And before you get to the child's best interest, you must establish a very high burden of proving either parents are unfit, [the] child has no suitable parent at that time, or there will be an actual detriment to the child.**

...

**That's – that's—that's the threshold.**

...

**[It's] clear to me that emotional -- that she will -- it will be emotionally difficult for her. It's a big adjustment. That does not say actual detriment.**

...

**He doesn't have to prove that he's fit. You need to provide that he's not. And so far, the evidence that I have seen, that has been given to me, that I saw was given to Commissioner Zinckier, uh, in the hearing that I heard, the only thing that anyone has really stated is that they have a limited relationship. That's true. He lives in California. There have been – there have been large gaps in time with very little communication between them. There is different allegations as to why that happened and how that happened. But that's true. And, um, he has a 2005, uh, domestic violence charge. That's almost ten years ago. And nothing since. That's all we know.**

...

**Adequate cause is actually a pretty high standard. You know that, because you practice in this area.**

...

**And actual detriment, to me, those are – those are—that a strong burden too. It's not it will possibly be unsettling. It will be emotionally difficult. It will be excruciatingly painful to**

be separated from the grandparents. I believe all those things that I just said are true. That's not actual detriment.

...

Well, we discussed the GAL. And I believe that Commissioner Zinnecker's reasoning for not appointing one, mainly, the costs involved with doing that, which is quite exorbitant, was her rationale. And her satisfaction that, um, a home inspection, the akin to that, which was done in a foster care arrangement or adoption, would be sufficient to establish that the home is a safe place for the child. I believe that's a precaution that she considered. And I find that to be adequate, too.

I think what I'm going back to is I – all of the pleadings and your presentation to me today is an effort to put the burden on the father to show that he is fit and that, you know, he's a suitable parent. But that's not the way it is. He has a right to parent his child – a constitutionally protected right. So it's – it's- it's – the burden is not on him.

...

... Having reviewed everything that's been submitted, and heard from the parties, I really understand the issues here, um, and the, uh, differences of interpretation of the various statutes and case law. But I do not find any reason to revise Commissioner Zinnecker's ruling in this case. I'm going to affirm it. ...

(RP 1-35)

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

Denial of of an adequate cause determination pursuant to RCW 26.10, the Non Parental Custody Statute, is reviewed for an abuse of

discretion. In re Custody of Stell, 56 Wn. App. 356, 783 P.2d 615 (1989). In re Marriage of Maughan, 113 Wn. App. 301 53, P.3d 535 (2002).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or for untenable reasons. In re Parentage of Schroeder, 106 Wn. App. 343, 22 P.3d 1280 (2001) (citing In re Marriage of Littlefield, 133 Wn.2d 39, 940 P.2d 136 (1997)). A decision is manifestly unreasonable if, based on the facts and the applicable legal standard, the decision is outside the range of acceptable choices. Schroeder, 106 Wn. App. at 349. A decision is based on untenable grounds if the findings are not supported by the record. Schroeder, 106 Wn. App. at 349.

A decision is based on untenable reasons if the court applies the wrong legal standard or the facts do not establish the legal requirements of the correct standard. Schroeder, 106 Wn. App. At 349. Because of the trial court's unique opportunity to observe the parties, the appellate court should be "extremely reluctant to disturb child placement dispositions". In re Marriage of Schneider, 82 Wn. App. 471, 918 P.2d 543 (1996), *overruled on other grounds by* In re Marriage of Littlefield, 133 Wn.2d 39 at 57, 940 P.2d 136 at (1997).

**B. THE UNITED STATES CONSTITUTION PROTECTS A BIOLOGICAL PARENTS' RIGHT TO HAVE CUSTODY AND RAISE THEIR CHILDREN.**

Analysis of the non parental custody statute and case law in Washington proves a clear priority of biological parents' right to have custody and raise their children:

**“The United States and Washington Supreme Courts have long recognized parents’ fundamental rights to care and custody of their children. The “rights to conceive and to raise one’s children have been deemed ‘essential,’ basic civil rights of man’... ‘It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder””.**

Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (citations omitted) (quoting Meyer v. Nebraska, 262 U.S. 390, 399, 43 S. Ct 625, 67 L. Ed. 1042 (1923); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942).

“The rights have been recognized as protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, and the Ninth Amendment.” In re Custody of T.L. 165 Wn. App. 268, 280, 268 P.3d. 963 (2011). See Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct 2054 (2000).

Regarding adequate cause, pursuant to Washington’s non parental custody statute, RCW 26.10.032 requires a non biological party seeking a

custody order to submit along with his or her motion an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and set forth facts supporting the requested order. RCW 26.10.032 states:

**Child custody motion — Affidavit required — Notice — Denial of motion — Show cause hearing.**

**(1) A party seeking a custody order shall submit, along with his or her motion, an affidavit declaring that the child is not in the physical custody of one of its parents or that neither parent is a suitable custodian and setting forth facts supporting the requested order. The party seeking custody shall give notice, along with a copy of the affidavit, to other parties to the proceedings, who may file opposing affidavits.**

**(2) The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order should not be granted.**

As stated above, the statute provides that the trial court shall deny the motion and dismiss the action unless it finds that adequate cause for hearing the motion is established by the affidavits. Id. Adequate cause has been defined in a modification context as a showing sufficient to support a finding on each fact that the movant must prove to prevail. In re Custody of E.A.T.W., 168 Wn.2d 335, 347, 227 P.3d 1284 (2010);

Washington courts have made it clear that a party seeking custody of a non biological child must either provide that the child is not in the

custody of the biological parents or are “unfit” or that providing custody to an otherwise fit parent would result in actual detriment to the child.

“Under chapter 26.10 RCW, a third party can petition for child custody, but the State cannot interfere with the liberty interest of parents in the custody of their children unless a parent is unfit or custody with a parent would result in actual detriment to the child’s growth and development.” In re Custody of B.M.H., 179 Wn.2d 224, 235, 315 P.3d 470 (2013). In re Custody of Shields, 157 Wn.2d 126, 136 P.3d 117 (2006)d.

“Whether placement with a parent will result in actual detriment to a child’s growth and development is a highly fact-specific inquiry, and precisely what might [constitute actual detriment to] outweigh parental rights must be determined on a case by case basis.” Shields, 157 Wn.2d 126, 143, 136 P.3d 117 (2006). “There must be a showing of actual detriment to the child, something greater than the comparative and balancing analyses of the ‘best interests of the child’ test. In re Marriage of Allen, 28 Wn. App 637, 645, 626 P.2d 16 (1981).

“The law's concept of the family rests in part on a presumption that natural bonds of affection lead parents to act in the best interests of their children,” *Parham v. J.R.*, 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*447), and

only under ““extraordinary circumstances”” does there exist a compelling state interest that justifies interference with the integrity of the family and with parental rights.” B.M.H., 179 Wn.2d at 235. Shields, 157 Wn.2d at 145 (quoting *In re Marriage of Allen*, 28 Wn. App. 637, 649, 626 P.2d 16 (1981). “To limit disruptions in family life, chapter 26.10 RCW places a high threshold burden on a petitioner seeking nonparental custody to allege specific facts that, if proved true, would meet this standard.” B.M.H., 179 Wn.2d at 236. *E.A.T.W.*, 168 Wn.2d at 338-39; RCW 26.10.032(1).

The burden of proof to award a non biological parent custody of a child pursuant to RCW 26.10 is so substantial that when properly applied, it will only be met in “extraordinary circumstances”. In re Custody of C.C.M., 149 Wn. App. 184, 203-204, 202 P.3d 971 (2009). Further, the moving party to a non parental custody action must prove their case by clear and convincing evidence. In re Custody of C.C.M., 149 Wn. App. at 205.

As indicated, the Court applies a “heightened standard” when making a determination of whether adequate cause has been established in a non parental custody action. In re Custody of B.M.H. 179 Wn.2d 224, 315 P.3d 470 (2013). B.M.H., *supra*, is instructive regarding denial

adequate cause for a non parental custody petition.<sup>3</sup> In B.M.H., a former step-father who had parented B.M.H. for his entire life petitioned the court for non parental custody. B.M.H.'s biological father had died 6 months prior to B.H.M.'s birth. The former step-father was present at B.H.M's birth, and even cut B.M.H.'s umbilical cord. The former step-father was actively involved in B.M.H.'s life and the parties even changed B.M.H.'s last name from the biological father's last name to the last name of the former step-parent. The only reason that he did not formally adopt B.M.H. was because of the effect it might have on the survivor benefits that B.M.H. receives by virtue of his biological father's death.

In 2001, the parties divorced but the former step-father continued to have residential time with B.M.H. for years until 2010 when the mother planned to move with B.M.H. 50 miles away. Out of concern of the proposed move and the impact that would have on his seeing B.M.H., the former step-father filed a non parental custody petition indicating that he had parented B.M.H.'s for his entire life and that removing him from

---

<sup>3</sup> B.M.H. *supra*, also addressed whether a former step-parent may bring a defacto parentage petition. The grandparents in the instant case did not submit a defacto parenting action and that issue is not the subject of this appeal.

B.M.H.'s life would cause detriment to his growth and development. Id. at 233.

The trial court found adequate cause to proceed with the non parental custody proceeding specifically finding that “...*if the Respondent/mother denies contact between Petitioner and minor child it would cause actual detriment to the minor child’s growth and development if the relationship between the minor child and the Petitioner is not protected, and the Court has concerns that the mother may withhold visitation contact in the future.*” Id. at 233.

The Court of Appeals affirmed the adequate cause finding of the trial court in In re Custody of B.M.H., 165 Wn.app. 361, 267 P.3d 499 (2011) and the mother petitioned the Supreme Court for Review. In re Custody of B.M.H., 173 Wn.2d 1031, 277 P.3d 668 (2012).

The Supreme Court granted review, reversed the trial and appellate Court finding of adequate cause and dismissed the step-father’s non parental custody petition. Specifically, the Court held:

**But here, without more extraordinary facts bearing on B.M.H.'s welfare, the prerequisites for a nonparental custody action have not been met. The concern that Ms. Holt might interfere with Mr. Holt and B.M.H.'s relationship is insufficient to show actual detriment under *Shields* and to meet the burden of production for adequate cause under *E.A.T.W.* [footnote omitted]. Although the importance of preserving fundamental psychological relationships and**

**family units was part of the court's analysis in *Allen and Stell*, there were more extreme and unusual circumstances that contributed to the finding of actual detriment. In each case, the child had significant special needs that would not be met if the child were in the custody of the parent. Continuity of psychological relationships and family units was particularly important where a child had these special needs. Here, additional circumstances have not been alleged. This court has consistently held that the interests of parents yield to state interests only where “parental actions or decisions seriously conflict with the physical or mental health of the child.” *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980) (citing *Parham*, 442 U.S. at 603). Other facts in the affidavits point to Ms. Holt's dating patterns and her decision to move to Castle Rock. These are not the kind of substantial and extraordinary circumstances that justify state intervention with parental rights. We reverse the Court of Appeals and dismiss the nonparental custody petition without prejudice.**

In re Custody of B.M.H., 179 Wn.2d at 239.

Another case that is instructive regarding the burden of proof necessary for non parental custody action is In re Custody of Anderson, 77 Wn.App. 261, 890 P.2d 525 (1995). In Anderson, *supra*, after a divorce proceeding where the father was ordered to have supervised visitation, the mother fled to Alaska out of concern that the father was being allowed unsupervised visitation. Pursuant to court proceedings, the father, his mother and his sister retrieved the child from Alaska and returned with her to Washington. The child was temporarily placed with the paternal aunt and her husband, who filed a Petition for Non Parental

Custody. The child resided with the paternal aunt and her husband for 2 years pending trial. A Guardian ad Litem was appointed who after performing her investigation, recommended that the child be returned to her mother. Id. at 263.

After trial, the court did not adopt the GAL's recommendation but instead granted the non parental custody petition and awarded custody to the paternal aunt and her husband specifically finding that, "*Darlene Anderson's past exhibition of grave instability in not being able to raise her other children, in going to Alaska to avoid a perceived problem, in moving from location to location within Alaska, and in lack of a definite plan for the present, would render her ability to care for Andrea less than satisfactory and would retard, interfere, and detrimentally affect the present and future growth and development that Andrea Anderson has experienced and will continue to experience with Petitioner's Ringe. ...*" In re Custody of Anderson, 77 Wn.App. at 265.

The Court of Appeals reversed the trial court's decision to grant the non parental custody petition and vacated the decree specifically holding as follows:

**In a nutshell, the court concedes Ms. Anderson loves her daughter, tries hard and is a fit parent, but firmly believes it has found a much better set of parents for Andrea, people with a good record who can offer the child a lot of things her**

**mother cannot. That does not satisfy the need for "something greater" than a balancing of the merits of the Ringes as parents against Ms. Anderson's merits as a parent nor is it a "powerful countervailing interest" justifying state interference with the parent/child relationship. The court cannot properly substitute for a finding of actual detriment to the child, its finding that returning Andrea to her mother will deprive her of all the wonderful opportunities available to her as a member of the Ringe family. [footnote omitted]. In the absence of a finding that returning Andrea to her mother would be, by itself, an actual detriment to the child, the court abused its discretion by placing the child in the custody of the nonparent Petitioners.**

In re Custody of Anderson, 77 Wn.App. at 265-266.

In In re Custody of S.C.D-L., 170 Wn.2d 513, 342 P.3d 918

(2010), the Supreme Court *reversed* the Court of Appeals ruling affirming the trial court's decision to grant a grandmother's non parental custody petition. In S.C.D-L., *supra*, a biological father in a paternity action sought and was granted custody of his daughter. The father married and moved with his wife and daughter to California. The child's school noticed "problems" with the child and contacted child services department who began an investigation. To avoid having child services in the child's life, the father arranged to have his mother who resided in Washington take temporary custody of his daughter. The father provided his mother with a list of the child's problems the child experienced including frequent mood swings, hyperactivity, depressed moods, self-mutilating behavior, pathological lying, stealing, lack of impulse control,

oppositional behavior, and compulsive behavior. Id. at 515. After the child moved to Spokane, the grandmother obtained counseling for the child that resulted in improved behavior. Id. at 515.

The child resided with the paternal grandmother from 2002 until December of 2007 when the father came to Washington to pick up the child. The paternal grandmother filed a non parental custody petition and sought custody of the child, who had resided with the grandmother for almost 6 years. The father had spent very little time with his daughter in that almost 6 year period of time.<sup>4</sup> The trial court granted adequate cause for the matter to proceed. After trial, the Court granted the non parental custody proceeding finding that placing the child with the father would detrimentally affect the child and awarded custody to the paternal grandmother. Id. at 516. The father appealed to the Court of Appeals, who affirmed the trial court's decision.

The Supreme Court reversed the trial court and Court of Appeals and vacated the trial court's non parental custody order. The Supreme Court specifically held:

**A nonparent may petition for custody of a child if the child is not in the physical custody of a parent or if the petitioner alleges that neither parent is a suitable custodian. RCW**

---

<sup>4</sup> The child spent six weeks with her father in California during the summer of 2003 and Christmas with him in Spokane in 2006.

**26.10.030(1). The trial court must deny a hearing on the petition unless the nonparent submits an affidavit (1) declaring that the child is not in the physical custody of one of the child's parents or that neither parent is a suitable custodian and (2) setting forth facts supporting the requested custody order. In re Custody of E.A.T.W., 168 Wn.2d 335, 348, 227 P.3d 1284 (2010). S.C.D.-L. was in Mr. Littell's physical custody at the time Ms. Littell filed her petition, and the petition does not allege that he is an unfit parent. Instead, the petition implies it would be in the child's best interest to reside with Ms. Littell, but the “best interests of the child” standard does not apply to nonparent custody actions. In re Custody of Shields, 157 Wn.2d 126, 150, 136 P.3d 117 (2006). Further, the petition avers no facts that would support the required allegation that Mr. Littell is an unsuitable custodian.**

**The trial court thus erred by finding adequate cause to proceed to trial. The purpose of a show cause hearing conducted under RCW 26.10.030 is to avoid unnecessary trials, since they are disruptive to families. E.A.T.W., 168 Wn.2d at 348. As we said in E.A.T.W., “A useless hearing is thus an unnecessary disruption and an evil to be avoided.” Id.**

**Because this matter should not have proceeded to trial, we reverse the Court of Appeals and vacate the trial court’s non parental custody order.**

In re Custody of S.C.D.-L., 170 Wn.2d at 516-517.

**C. THE COURT PROPERLY DENIED ADEQUATE CAUSE PURSUANT TO RCW 26.10.032 AND DISMISSED THE GRANDPARENTS PETITION FOR NON PARENTAL CUSTODY.**

In the instant case, the Court properly denied adequate cause and dismissed the grandparents’ non parental custody action. While the grandparents made general statements in their petition and declaration

about detriment stemming from the change in her environment, i.e., moving from Washington to California, what is glaringly missing from their declarations are any facts specific to LMS regarding actual harm to her growth and development.

Contrary to the grandparent's assertion, the trial court did not "rip" LMS away from the only home she had ever known and "place her with a stranger" as alleged by the grandparents. LMS was bonded to Tony, as evidenced by the uncontroverted testimony in Tony's and his wife, Vaelua's, declarations regarding the reaction LMS had to Tony when she visited him in California in 2012:

**Once our car pulled up to the house, [LMS] could not even wait for her Dad to step out from the car before running to him and leaping into his arms hugging him and crying saying: "Daddy, Daddy". I watched Tony and [LMS] reunite as if all the time apart had not affected their Love (sic) for each other. She still knew her Dad and loved him so much. Tony often compared our sons' looks to [LMS] and when I saw her, I immediately felt that connection between her and her Brothers (sic). ... Throughout this whole time, [LMS] never once left her Father's side. She clung to him and asked him so many questions: "what's your favorite color Daddy?" "Daddy, What's your favorite foods?" I watched on so overjoyed for my Husband because I knew this was the moment he had dreamt about for his Daughter! I rarely see my Husband quite and especially cry, but this time with his daughter Tony was so emotional he was speechless. He stared at [LMS] with disbelief and so much love for her, that he could barely keep his composure ...**

(CP 234-235).

Tony stated in his declaration to the Court:

**In July of 2013, Lisa visited San Diego on a vacation. Lisa brought [LMS] to see my grandmother and I was allowed to see [LMS] at my grandmother's house in San Diego. When I got there, [LMS] ran to me crying, calling me "Daddy" and telling me she missed me. ...**

(CP 208).

Given the above uncontroverted testimony, the grandparent's claim that Tony is a "*stranger*" to LMS and "*but for biology*" he is "*not too different from any other stranger that LMS may have met a few times*" is completely false. In fact, from the behavior exhibited by LMS towards her father, LMS loves her father and is bonded to him. The statements by the grandparents only serve to illustrate the harm that would have been caused to LMS if she would have been left in their care as it relates to LMS's being alienated from her father. It also shows that the grandparents are out of touch with LMS's real feelings towards her father.

The trial court specifically found that, "*The child has a relationship with the father and thinks of the father as her father.*" (CP 61). The trial court's finding was consistent with the evidence presented regarding the relationship that Tony had with LMS. Further, pursuant to In re Custody of A.F.J., 179 Wn.2d 179, 314 P.3d 373 (2013), a non

parental custody order is temporary in nature. The A.F.J., *supra*, court stated:

**[a] non parent custody order confers only a temporary and uncertain right to custody of the child for the present time, because the child has not suitable legal parent. When and if a legal parent becomes fit to care for the child, the non parent has no right to continue the relationship with the child.**

A.F.J., 179 Wn.2d at 186 (quoting *In re Parentage of J.A.B.*, 146 Wn.app. 417, 426, 191 P.3d 71 (2008)).

It is also important to note that while the grandparents claimed that they had raised LMS for her “entire life” that claim was disputed by Tony. In fact, it is uncontroverted that the father resided with the mother and LMS for the first year of LMS’s life. (CP 199). Tony’s parents spent residential time with LMS up until 2009 and picked LMS up from Lisa who at times had her own residence. (CP 206-207).

The trial court’s dismissal of the grandparents’ non parental custody petition is also consistent with the reported cases in which the Court determined that no actual detriment to the child’s growth and development was proven with substantial evidence. For example, in *In re Custody of B.M.H.*, 165 Wn.App. 361, 267 P.3d 499 (2011), the Washington Supreme Court reversed the trial and appellate court’s determination that actual detriment would be caused if the relationship

between the petitioning step-father and the child was not protected. The step-father had been involved in caring for the child for the child's entire life. However, there were no "extreme and unusual" circumstances such that were presented justifying state involvement in the biological mother's right to parent her child thus, the non parental custody petition was denied. While the grandparents in this case have described the effect of taking a child away from a person who has acted as a parent, they have not described any extreme or unusual circumstances justifying State involvement interfering with Tony's constitutionally protected right to parent his child.

Similarly, in In re Custody of Anderson, 77 Wn.App. 261, 890 P.2d 525 (1995), the Court of Appeals reversed the trial court's finding that returning the child to her biological mother would retard, interfere and detrimentally affect the present and future growth and development of the child after being in the custody of the paternal aunt and uncle for approximately 2 years. Although the Court of Appeals recognized that the petitioners in that case may have been able to provide the child with a better life and more opportunities, no extreme or unusual circumstances existed in Anderson, *supra*, regarding facts specific to the child that would rise to the level of actual harm justifying taking the child from her

biological mother. The same is true in this case as the grandparents have not shown that there would be actual harm to LMS's growth and development to be raised by Tony who has a loving intact family with his wife. All of the grandparents arguments are based on the change in LMS's environment, but the reported non parental custody cases that have been denied by the courts involve a change in the child's environment from a non parent to a biological parent. LMS will have just as many opportunities living with Tony but will also have the security of her biological father to protect her best interests for her entire life.

In In re Custody of S.C.D-L, 170 Wn.2d 513, 342 P.3d 918 (2010), the Supreme Court reversed the trial and appellate court's determination that the child would suffer detriment if removed from the paternal grandmother after finding adequate cause to proceed with the action. The child in that case had resided with the paternal grandmother for almost 6 years and the father had very little physical contact with his daughter. The Supreme Court determined that despite the fact that the child had some pretty severe emotional issues, and that the physical contact between the father and his daughter was minimal, that it was error for the trial court to have found adequate cause to proceed to trial and vacated the non parental custody order. Similarly in this case, Tony did

not have substantial contact with LMS due in part to the threats of Lisa's father, including threats to kill him or have him killed if he came around Lisa or LMS which Tony took very seriously after he was assaulted by Lisa's father. (CP 248). However, the trial court recognized that there was a bond between Tony and LMS and that the grandparents had not shown actual detriment to LMS's growth and development if she were to primarily reside with her father.

The reported cases that have granted a third party custody petitions over a biological parent's right to raise their child all have a similar theme in that there are facts specific to the child such as a special need, that would not be properly addressed if custody were given to the biological parent. This was the holding in the recent Division III Court of Appeals Decision of In re Custody of J.E., No. 32062-6 III (Filed August 4, 2015 with Amended Opinion August 6, 2015). In J.E., *supra*, the Court of Appeals reversed the trial court's decision to grant 50/50 custody of the child between the child's parents and the child's uncle and aunt. The Appellate Court held that because there was no evidence that the child had a *special need* that the biological parents could not care for, the non parents failed to prove that granting custody to the parents would

result in actual harm to the growth and development of the child.

Specifically, the J.E., *supra*, court stated:

**We hold the trial court erred in applying the actual detriment standard because substantial evidence does not establish specific facts showing J.E. had any specific significant special need that could not be met by his parents.**

...

**Moreover, actual detriment is not shown because a parent may interfere with the relationship between the non parent and the child. B.M.H., 179 Wn.2d at 239 (stating while “the importance of preserving fundamental psychological relationships and family units” has been used to uphold a non parental custody decree, more extreme and unusual circumstances existed in those cases, such as a child whose significant special needs would not be met if the child were in the parent’s custody).**

In re Custody of J.E., Division III Court of Appeals (2015).

In In re Custody of Allen, 28 Wn. App. 637, 626 P.2d 16 (1981), the Court of Appeals affirmed the trial court’s non parental custody order granting custody of a deaf child to his step-mother. In Allen, *supra*, the child was profoundly deaf and as a result had not learned to speak. Allen, 28 Wn. App. at 639. When the child came to the home of the biological father and step-mother, the child was 3 years old and his intellectual development was behind that of normal hearing children his age. The step-mother worked hard to find special training for the child including her learning and use of sign language in her home. She and her 3

biological children learned sign language as fluently as ordinary speech and always used sign language when in the presence of the child. By contrast, the biological father had only learned minimal sign language.

By the time the matter went to trial, the child was at a level of intellectual development equivalent to that of hearing children his age. Due to the extraordinary circumstances of the case, the Court approved the third party custody action granting custody of the child to the step-mother.

In the instant case, the grandparents did not identify any special need that LMS had that could not be taken care of by her father, if custody were provided to him. In fact, while under the grandparents' care, LMS was not being brought to school on time and had excessive absences. (CP 278-79). Tony received records from the school that indicated as of March 10, 2014, LMS had been absent 17 days and was tardy 19 times. (CP 278). The school had to write two separate letters indicating that LMS's education was being negatively impacted as a result of these excessive absences and being tardy. (CP 278-79). Tony testified in his declaration that he would be able to get LMS to school on time and that she would be ready to learn. (CP 250). The trial court properly determined that the grandparents had not met the adequate cause

requirement that either Tony was an unfit parent or that actual harm would come to LMS's growth and development if custody were not granted to them.

**D. THE TRIAL COURT PROPERLY FOUND THAT RESPONDENT WAS A FIT PARENT WHEN DENYING THE GRANDPARENTS' NON PARENTAL CUSTODY PETITION.**

The evidence before the trial court clearly indicated that Tony was a fit parent. Specifically, Tony described that he provided parenting functions for LMS during the period of time that he lived together with Lisa until he moved to California for the purposes of improving his employment situation. (CP 203).

Further, Tony's declarations to the Court describe his marriage to his current wife as well as the love and care that he provides to his two children. (CP 203-05). This included involvement in their church and community. (CP 204-05). While the grandparents attempted to prove that Tony was an unfit parent, the Pro Tem Court Commissioner and trial judge clearly found that after considering all of the evidence presented, that Tony was a fit parent and that it was in LMS's best interests to primarily reside with him rather than the maternal grandparents. (CP 61,

Further, Tony was not absent absent from LMS' entire remembered life as claimed by the grandparents. Specifically, during the

visit which occurred in July of 2012, as soon as LMS saw Tony, she ran and leaped into his arms hugging him and crying, “Daddy, Daddy” telling Tony that she missed him. (CP 235). In fact, the evidence presented to the trial court showed that LMS never left Tony’s side during the entire visit. (CP 235). She clung to Tony and asked him numerous questions such as, “what’s your favorite color Daddy?” and “What’s your favorite foods?”. (CP 235).

The grandparents also did not provide sufficient evidence to the trial court that Tony engaged in a history of acts of domestic violence that would rise to the level of restrictions against him in a parenting plan. Mere *accusations* of factors that would restrict a parties’ decision making authority or residential time without proof are not sufficient to invoke the restrictions under RCW 26.09.191. In re Marriage of Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998). While Tony was arrested in 2005 after an argument with Lisa ensued at the airport, this was prior to LMS’s birth. (CP 198). Tony denied he engaged in domestic violence but agreed to domestic violence behavioral therapy resulting in dismissal of the charge against him. (CP 199).

Further, Tony did not abandon LMS as claimed by the appellants. Tony moved to California for the purpose of bettering his employment

and living situation. (CP 203). Tony was afraid of repercussions from Lisa's father, who during an altercation punched Tony in the face. (CP 248). Lisa's father also threatened to kill Tony or have him killed if he came around Lisa or LMS. (CP 248). Tony's attempts to reach LMS were also thwarted by Lisa who changed her phone number and kept LMS hidden from Tony's parents after they had established a relationship with LMS, and spent weekends with her when Lisa was residing with LMS away from her parents' residence. (CP 207-08). Based on the evidence, the trial court properly concluded that Tony was a fit parent.

**E. THE COURT PROPERLY DENIED THE GRANDPARENT'S REQUEST FOR APPOINTMENT OF A GUARDIAN AD LITEM, PURSUANT TO RCW 26.10.030 AND 26.12.175 WHEN DENYING ADEQUATE CAUSE AND DISMISSING THE PETITION.<sup>5</sup>**

The trial court acted within its discretion when denying the request to appoint a Guardian ad Litem pursuant to RCW 26.12.175.<sup>6</sup> Tony disputes the appellant's claim that the parties agreed to appoint a Guardian ad Litem. While there may have been specific discussion of a particular Guardian ad Litem *in the event that the Court appointed one*,

---

<sup>5</sup> Appellants cite RCW 26.10.070 regarding appointment of an attorney for the child but this was never requested by the grandparents.

<sup>6</sup> A Guardian ad Litem has been appointed for LMS in the parentage modification action.

that is not the same as agreeing to the appointment of a Guardian ad Litem.

In fact, Tony was clear in his Response to the non parental custody petition that he asked the Court to dismiss the case. (CP 200). This is also evidenced by the Motion to Dismiss that Tony filed, in which he specifically addressed the fact that appellants did not have adequate cause that he was an unfit parent and that there would be no actual detriment to LMS to allow him to raise her as his biological daughter. (CP 190-196).

At the hearing on November 14, 2014, the Court specifically ordered a home study, to be conducted to determine that the father's residence was for LMS. The trial court acknowledged this home study and specifically found that was sufficient to protect LMS pursuant to the facts of this case.

While there is language in In re Custody of Stell, 56 Wn. App. 356, 783 P.2d 615 (1989) regarding the non-appointment of a Guardian ad Litem being ill advised, in Stell, there was no requirement that an adequate cause determination be made prior to the matter being set for trial as RCW 26.10.032 was not enacted until 2003. In re Custody of E.A.T.W, Wn.2d at 342. In this case, the grandparents did not seek a

continuance of the adequate cause threshold hearing nor did they contend that they did not have adequate time to prepare for the hearing. The Court properly denied the appointment of a Guardian ad Litem pursuant to the facts of this case.

**F. THE COURT SHOULD AWARD RESPONDENT HIS ATTORNEY'S FEES PURSUANT TO 26.10.080 and RAP 18.1.**

RCW 26.10.080 provides authority for the Court to award attorney's fees based on a need versus ability to pay analysis.

Specifically, RCW 26.10.080 states:

**The court from time to time, after considering the financial resources of all parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection therewith, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.**

**Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorney's fees in addition to statutory costs.**

In the instant case, Tony filed a Financial Declaration with the Court indicating that his net income is \$2,200 per month. (CP 238). The Appellants filed a Financial Declaration indicating that their net income was \$4,068 per month, although it is unclear if this is both of the

grandparents or only one of the grandparents. (CP 40, 46). Under either scenario, the grandparents represented that they earn almost double what Tony earns. The Financial Declaration filed by the grandparents also indicates that they have \$9,000 in savings. (CP 48). Pursuant to a need versus ability to pay analysis, the grandparents have the ability to pay Tony's attorney's fees.

Under RAP 18.1, a party has a right to recover reasonable attorney fees or expenses on review. RAP 18.1. The amount of fees and expenses should be calculated at a later time, by affidavit. RAP 18.1(d).

## V. CONCLUSION

The non-parental custody statute and applicable case law makes it clear that a Petitioner seeking to establish custody of a non-biological child is required to prove by substantial evidence that either the biological parents are unfit to care for the child or that placing a child with an otherwise fit parent would cause actual harm to the growth and development of the child. The right to raise one's child is essential and a basic constitutionally protected right. In this case, the grandparents did not meet the very high burden that has been described by the Court as "extraordinary" regarding either Tony being unfit or facts specific to LMS in support of a finding that actual detriment would occur to her

growth and development if custody were awarded to her father. The trial court properly exercised its discretion by denying adequate cause and dismissing the grandparents' case.

Dated this 6<sup>th</sup> day of August, 2015

**TSAI LAW COMPANY, PLLC**

A handwritten signature in black ink, appearing to read "Philip C. Tsai", written over a horizontal line.

Philip C. Tsai, WSBA #27632  
Attorneys for Tony Samoa Fuga

## PROOF OF SERVICE

Marcus Cannon certifies as follows:

On August 6, 2015, I served upon the following a true and correct copy of this Brief of Respondent via Email, and Legal Messenger:

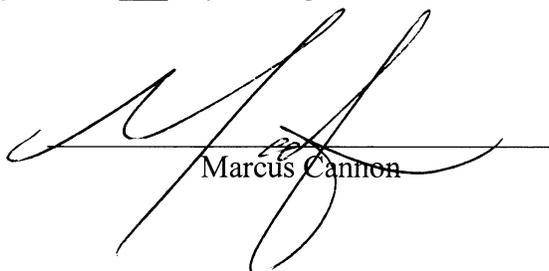
Laura A. Carlsen  
McKinley Irvin, PLLC  
1201 Pacific Avenue, Suite 2000  
Tacoma, WA 98402

Elizabeth Hoffman  
McKinley Irvin, PLLC  
1501 4<sup>th</sup> Avenue, Ste 1750  
Seattle, WA 98101

Brian Edwards  
Pivotal Law Group  
One Union Square, Suite 1730  
600 University Street  
Seattle, Washington 98101

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 6<sup>th</sup> day of August, 2015 at Seattle, WA.

  
\_\_\_\_\_  
Marcus Cannon

**APPENDIX**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

---

In re the Parentage of: )  
) King County No.:  
STATE OF WASHINGTON, ) 12-5-01550-4 KNT  
) )  
) Petitioner, ) Court of Appeals No.:  
) 72938-1-I  
) )  
and )  
) )  
) )  
LISA LYNNETT SIUFANUA, )  
) )  
TONY SAMOA FUGA, )  
) )  
) )  
) Respondents. )

---

In re the Custody of: )  
) King County No.:  
LEILA MALEKA SIUFANUA, ) 14-3-07079-2 KNT  
) )  
) Child, ) Court of Appeals No.:  
) 72938-1-I  
FAUALUGA SIUFANUA and BILLIE )  
SIUFANUA, )  
) )  
) Petitioners, )  
) )  
and )  
) )  
) )  
TONY SAMOA FUGA, )  
) )  
LISA LYNNETT SIUFANUA, )  
) )  
) )  
) Respondents. )

---

VERBATIM REPORT OF PROCEEDINGS  
(FROM TAPED PROCEEDINGS)

BE IT REMEMBERED that the foregoing and numbered proceeding was heard on December 12, 2014, before THE HONORABLE SUZANNE PARISIEN, Judge.

ELIZABETH HOFFMAN, Attorney at Law, 1501 4th Ave, Ste 1750, Seattle, WA 98101, appearing on behalf of Billie Siufanua;

BRIAN EDWARDS, Attorney at Law, 2411 14th Ave S, Seattle, WA 98144, appearing on behalf of Lisa Siufanua;

SHERRI BENNETT, Attorney at Law, 1200 Westlake Ave N, Ste 700, Seattle, WA 98109, appearing on behalf of Tony Fuga.

(Proceedings transcribed by: Adrienne Kuehl)

WHEREUPON, the following proceedings were had and done, to wit;

INDEX

Pages

Colloquy, pages 4-34.

EXHIBITS

Offered   Admitted   Denied

None admitted.

1 BAILIFF: Court is in session.

2 THE COURT: Good afternoon, everyone. Please be  
3 seated. Okay. We are here this afternoon on a revision,  
4 uh, in the matter of Cause Number 14-3-07079-2 KNT  
5 designation.

6 Um, and before I have, uh, Counsel and their clients  
7 identify themselves for the record, I just want to address,  
8 I had a couple of pre-trial conferences that were supposed  
9 to be, uh, a half an hour ago. And I know I have some  
10 folks here.

11 (WHEREIN OTHER MATTERS WERE DISCUSSED)

12 THE COURT: So I will have now on my revision. Please  
13 have, uh, Counsel identify themselves and their clients for  
14 the record, please.

15 MS. HOFFMAN: Yes, Your Honor. Elizabeth Hoffman,  
16 Counsel for, um, the Petitioner grandparents in the non-  
17 parental custody matter. They are present. Ms. Siufanua  
18 is to my right, and the maternal grandfather is here as  
19 well.

20 THE COURT: Good afternoon.

21 MS. SIUFANUA: Afternoon.

22 MS. HOFFMAN: And this is Brian Edwards, who, as you  
23 know from last week, is Counsel for the mother.

24 THE COURT: Yes. Good afternoon.

25 MR. EDWARDS: Good afternoon. My client is present as

1 well.

2 THE COURT: Okay, thank you. And Counsel?

3 MS. BENNETT: I'm Sherri Bennett, representing the  
4 Respondent Father, Tony Fuga, who is present in court to my  
5 left. And his parents are also present in the courtroom.

6 THE COURT: Okay. Good afternoon to everyone. Um,  
7 okay, Counsel. Um -- um, Ms. Hoffman, your -- your Motion  
8 to Revise. Would you like to reserve a couple of moments?

9 MS. HOFFMAN: Yes, I would, Your Honor.

10 THE COURT: Okay. Uh, so, uh, whenever you're ready.

11 MS. HOFFMAN: Your Honor, would it be okay if I argued  
12 up there?

13 THE COURT: You can argue wherever you would like.

14 MS. HOFFMAN: Okay. And I don't know, Sherri, if you  
15 wanted -- okay.

16 Your Honor, this is our -- my client's Motion for  
17 Revision of, um, Commissioner Pro Tem Zinnecker's Order,  
18 which dismissed the Non-Parental Custody Petition that they  
19 filed last month. And, um, Commissioner Zinckier, as you  
20 know, dismissed their petition because she found that there  
21 was no adequate cause for the, um, case to proceed. And  
22 that is really the issue that the Court is addressing today  
23 is whether or not there was at the time of that hearing on  
24 November 14<sup>th</sup> adequate cause, um, for the Non-Parental  
25 Custody Petition to go forward.

1 Um, as the Court knows, the standard for an adequate  
2 cause determination in a non-parental custody case is set  
3 forth in RCW 26.10.32, which does require a show cause  
4 hearing and an affidavit which, um, sets forth facts to  
5 support that the child is not in the physical custody of  
6 one of its parents, or that neither parent is a suitable  
7 custodian to the child.

8 And the -- that is a two-prong test, the second prong  
9 of which, um, is the suitable custodian, uh, factor. And  
10 it is, um, really the factor that the Court has to think  
11 about today. Um, because it was very clear at the time of  
12 the adequate cause hearing that -- and actually, is still  
13 true now -- that this eight-year-old, almost nine-year-old  
14 child, um, was not in the custody of either of her parent,  
15 but was in the custody of my client.

16 Your Honor is pretty familiar, I think, at this point,  
17 with the facts. So I'm not going to get into a lot of  
18 facts.

19 THE COURT: No need to. Thank you.

20 MS. HOFFMAN: Okay. Um, but what I am going to talk  
21 about is the second factor, which again, is the suitable  
22 custodian factor. And where I think the Court below, um,  
23 erred in its interpretation of the statute was in its  
24 reliance on, um, the fact that it found that Mr. Fuga was  
25 not, quote, "unfit". And that is not, in fact, the

1 standard that the Court applies in determining whether a  
2 parent is a suitable custodian, per se.

3 The Court may be familiar with the *Shields* case. Um,  
4 I can provide the cite. It is, um --

5 THE COURT: Has it been already put in -- already  
6 cited to me in the written materials?

7 MS. HOFFMAN: I am not sure, Your Honor, if it was  
8 cited --

9 THE COURT: Okay.

10 MS. HOFFMAN: -- below. But it is, um, a 2006 case.  
11 It is one of the primary, um, cases that interprets the  
12 non-parental custody, uh, statute. And what that case says  
13 is that a person has standing to bring a non-parental  
14 custody proceeding if a parent is either unfit, or if  
15 placement with that parent would result in actual detriment  
16 to the child.

17 And the *Shields* case involved a child who was really  
18 raised primarily by his father and his stepmother, and had  
19 visitation with his mother, but not very much visitation.  
20 And that is quite a lot like Leila here, in the fact that  
21 she does know her father, and she has spent time with him,  
22 but she has never resided with him primarily, or at least  
23 has not resided with him for roughly the last six years,  
24 depending on whose facts you believe.

25 And under that standard of actual detriment, the Court

1 in *Shields* did find, um, that the stepmother of the child  
2 there was the best person for the child to reside with,  
3 even though the child's biological mother was not, in fact,  
4 unfit, under the authorities in this state.

5 And so under that test, there is definitely sufficient  
6 evidence to support a finding that at least at this time  
7 and on the information that the Court has before it, that  
8 placement of the child with her father will cause actual  
9 detriment to her, emotionally at the very least.

10 And some of those, um -- some of the things that would  
11 support the Court in finding that are the fact that, as the  
12 Court knows, the child has had very, very limited contact  
13 with her father since she was three-years-old at the  
14 oldest, if not even before that. That she has resided  
15 primarily with her maternal grandparents or her mother for  
16 her entire life. Um, that she has never resided with her  
17 father primarily, that she has never resided in California,  
18 which is the state that she will move to, um, in just a  
19 week or two. She has little to no relationship with the  
20 children that she will be residing with and the stepmother  
21 that she will be residing with. And we know that the  
22 father has at least one documented incident of committing  
23 acts of domestic violence, although, it was some time ago.  
24 And that was an act of domestic violence against the  
25 child's mother.

1 Other factors that would clearly demonstrate a high  
2 risk of detriment to Leila is the fact that she will be, by  
3 operation of her no longer living with her maternal  
4 grandparents, taken away not only from those grandparents  
5 and from the children who reside in her home, like siblings  
6 to her, but also from her mother.

7 And I notice -- I noted that the Court last week, um,  
8 in talking about the temporary arrangements that  
9 Commissioner Zinckier ordered, um, touched on the fact that  
10 by ordering Leila to live with her paternal grandparents,  
11 the Court -- that was sort of the Court's mechanism for  
12 getting Leila reacquainted with her father and sort of an  
13 informal reunification process. And that was from your  
14 viewpoint, Your Honor, partial -- had to have been intended  
15 to support the child in developing and maintaining a  
16 relationship with her father.

17 And I think that same analogy is something that the  
18 Court does need to think -- or that same type of analysis  
19 is something that the Court does need to apply when it  
20 thinks about the detriment that will be caused to this  
21 child by being moved to California. And that is with  
22 regard to the child's mother.

23 And while it is clear and not really in dispute that  
24 the child's mother is facing certain challenges at this  
25 time that make her not really up to the task of being

1 Leila's full time parent, between the two parents, I think  
2 it's pretty clear that she is the person that this child  
3 has the strongest bond to, because she was raised primarily  
4 by her mother.

5 THE COURT: She's going -- about to be incarcerated,  
6 is my understanding.

7 MS. HOFFMAN: That's correct.

8 THE COURT: So she won't --

9 MS. HOFFMAN: I do understand.

10 THE COURT: -- so she won't be able to -- you're  
11 saying she won't be able to full time parent. She won't be  
12 able to any time parent.

13 MS. HOFFMAN: Yes. Well, and we don't -- as far as I  
14 understand, we don't know exactly how that's going to work  
15 out. And by the time this case goes to trial, that will be  
16 better known.

17 Which leads me to my second -- the second issue with  
18 the Court's order, which was not appointing a GAL under  
19 that matter either. And the problem for that -- with that,  
20 Your Honor, is something that Mr. Edwards talked about last  
21 week, and it remains a problem today, which is that without  
22 a GAL, the person how really gets lost in the shuffle here  
23 is Leila. Because at this time, we've heard from the  
24 parents, and we've heard from the grandparents. And we  
25 understand what each party has to say about the other. But

1 we don't know is how this child feels about this move, how  
2 she will be impacted by this move. And given that she will  
3 be living thousands of miles away with her father, with no  
4 Guardian ad Litem appointed, no mechanism to know what is  
5 going on with her or what is going in the father's -- on in  
6 the father's home on any kind of ongoing basis.

7 THE COURT: Well, we're having -- as you know, there  
8 has already been --

9 MS. HOFFMAN: There is a home study.

10 THE COURT: -- a home study that I think has already  
11 happened, or it was -- so --

12 MS. HOFFMAN: What Ms. Bennett stated to the Court was  
13 that the home study, I believe, the visit was to -- for the  
14 purposes of completing the home study was to occur on the  
15 10<sup>th</sup>.

16 THE COURT: Okay. So a couple days ago.

17 MS. HOFFMAN: A couple days ago. And as far as I  
18 know, there's no report done yet. But that is not a GAL  
19 report. It is not a substitute for a GAL report.

20 THE COURT: Right.

21 MS. HOFFMAN: It is -- it does touch on probably some  
22 of the things the Court's going to care about. But it is  
23 not an interview of the child. It is not aimed at  
24 protecting the child's best interest. But it is some --  
25 gives us some information about the father's home.

1 THE COURT: Right. But we know the standard is  
2 different. It's -- the standard here is not what is in  
3 Leila's best interest.

4 MS. HOFFMAN: Actually, Your Honor, in terms of  
5 deciding custody, the standard is what is in Leila's best  
6 interest.

7 THE COURT: This is a third-party custody case.

8 MS. HOFFMAN: Yes.

9 THE COURT: And before you get to the child's best  
10 interest, you must establish a very high burden of proving  
11 either parents are unfit, child has no suitable parent at  
12 that time, or there will be an actual detriment to the  
13 child.

14 MS. HOFFMAN: That's correct.

15 THE COURT: That's -- that's -- that's the threshold.

16 MS. HOFFMAN: Uh huh.

17 THE COURT: So --

18 MS. HOFFMAN: And my -- and what I've -- what I've  
19 argued just moments ago is that there is more than adequate  
20 evidence for the purposes of adequate case in a temporary  
21 order prior to trial on all the issues to believe that  
22 there is a high risk of actual detriment to this child  
23 being removed from the only home she has ever lived in --

24 THE COURT: It is --

25 MS. HOFFMAN: -- with the only people she has ever

1 known.

2 THE COURT: -- clear to me that emotional -- that she  
3 will -- it will be emotionally difficult for her. It's a  
4 big adjustment. That does not say actual detriment.

5 MS. HOFFMAN: Well, Your Honor, again that leads me  
6 back to the GAL, which is how do we know that? What  
7 mechanism is in place to know that this child will not  
8 suffer actual detriment as a result of this move? The  
9 father, as a parent, is virtually unknown to the Court.  
10 And that's not going to be fixed by a home study.

11 THE COURT: He doesn't have to prove that he's fit.  
12 You need to prove that he's not. And so far, the evidence  
13 that I have seen, that has been given to me, that I saw was  
14 given to Commissioner Zinckier, uh, in the hearing that I  
15 heard, the only thing that anyone has really stated is that  
16 they have a limited relationship. That's true. He lives  
17 in California. They have been -- there have been large  
18 gaps in time with very little communication between them.  
19 There is different allegations as to why that happened and  
20 how that happened. But that's true. And, um, he has a  
21 2005, uh, domestic violence charge. That's almost ten  
22 years ago. And nothing since. That's all we know.

23 MS. HOFFMAN: In the State of Washington.

24 THE COURT: In the State of Washington. And that's  
25 all I have access to. And I don't have any, um, reason to

1 believe that there is anything else. And I have  
2 declarations from the father about his life in California,  
3 his family in California. Uh, and recent efforts that he  
4 has made to reconnect with the child before any of this  
5 even started. Which says to me that he was attempting to  
6 reestablish that relationship, again, before any of this --  
7 these complicating facts occurred. So that speaks to the  
8 Court as well.

9 MS. HOFFMAN: I understand that, Your Honor.  
10 Although, I think it's important to note that the efforts  
11 you're speaking of, as far as I understand the record, are  
12 that he made efforts within the last several months. And  
13 that many, many years went by where he did very, very  
14 little to see the child.

15 THE COURT: And there's conflict in testimony about  
16 why that is. And his efforts, um, were not exactly met  
17 with, um, friendliness or openness by the mother or her  
18 family either.

19 MS. HOFFMAN: That may be the case, Your Honor. But  
20 again, the standard here is adequate cause. It is not a  
21 trial.

22 THE COURT: No, but it's a pretty high standard.

23 MS. HOFFMAN: Well --

24 THE COURT: Adequate cause is actually a pretty high  
25 standard. You know that, because you practice in this

1 area.

2 MS. HOFFMAN: I do. But I think again the focus on  
3 unfitness is misplaced. Because what *Shields* says is that  
4 it's either unfit or result in actual detriment.

5 THE COURT: And actual detriment, to me, those are --  
6 those are -- that's a strong burden, too. It's not it will  
7 possibly be unsettling. It will be emotionally difficult.  
8 It will be excruciatingly painful to be separated from the  
9 grandparents. I believe all of those things that I just  
10 said are true. That's not actual detriment.

11 MS. HOFFMAN: By the time this Court gets -- this case  
12 goes to trial, which it will in one form or another if it  
13 does not settle, how is the Court to know what -- without a  
14 GAL whether this has resulted in actual detriment?

15 THE COURT: Well, we discussed the GAL. And I believe  
16 that Commissioner Zinnecker's reasoning for not appointing  
17 one, mainly, the costs involved with doing that, which is  
18 quite exorbitant, was her rationale. And her satisfaction  
19 that, um, a home inspection, the akin to that, which was  
20 done in a foster care arrangement or adoption, would be  
21 sufficient to establish that the home is a safe place for  
22 the child. I believe that's a precaution that she  
23 considered. And I find that to be adequate, too.

24 I think what I'm going back to is I -- all of the  
25 pleadings and your presentation to me today is an effort to

1 put the burden on the father to show that he is fit and  
2 that, you know, he's a suitable parent. But that's not the  
3 way it is. He has a right to parent his child -- a  
4 constitutionally protected right. So it's -- it's -- it's  
5 -- the burden is not on him.

6 MS. HOFFMAN: Well, Your Honor, I think given your  
7 comments, I -- I don't feel that it's necessary for me to  
8 continue, um, with the record.

9 THE COURT: I mean, if you -- I -- I am -- I am very  
10 happy to have you use all the time that you have.

11 MS. HOFFMAN: Well, Your Honor, again, I think that --  
12 that the purpose of the adequate cause, it's a threshold  
13 hearing. It is not a trial. And what the Court's order  
14 does, is it places the child out of the reach of the  
15 Washington courts. It -- it orders a home visit, which no  
16 one asked for, instead of a GAL report that will not even  
17 look at what happens when the child is in California with  
18 the father.

19 There's a -- the home visit was scheduled to occur on  
20 December 10<sup>th</sup>. The child is not living there. And  
21 apparently, I -- as far as I know, I don't -- I don't  
22 actually know. So I guess I'll say, I do not know whether  
23 this home visit, as ordered by Commissioner Zinckier, will  
24 -- will include, for example, an interview with the child.  
25 And as far as I also understand, I don't believe it will

1 include any follow-up with the child. I don't believe it  
2 will include any interviews with any collateral contacts to  
3 find out how the child is doing once she gets to  
4 California.

5 And so the effect of Commissioner Zinnecker's order is  
6 that the child will be -- we will have the -- the mother of  
7 the child, who is still a party to this case, and is also  
8 still this child's parent, will -- and the grandparents,  
9 who clearly have a very strong relationship with the child,  
10 and may very well meet the standards for intervening in the  
11 modification case, but that's another issue. Um, we'll  
12 have no way to know whether or not this child is just  
13 acclimating to this new life with, um -- with some  
14 interruptions at the time that she initially goes there.  
15 Because there's no protection for the child under the  
16 current -- the orders that were entered.

17 And given the fact that every party involved appeared  
18 to be willing and wanting a GAL, I guess I remain mystified  
19 by the fact that the will of the parties to the case, the  
20 people who know the child, is being supplanted by the idea  
21 that it's too expensive, so we won't do it.

22 Um, and that is the last thing that we really have, at  
23 least from the standpoint of the mother and my clients, to  
24 know if, in fact, what the Court believes will happen with  
25 the child is what is going to happen. Because once she's

1 in California, she's there. She's thousands of miles away.  
2 She's in the custody of the father. And --

3 THE COURT: This Court has continuing jurisdiction.

4 MS. HOFFMAN: Of course it does.

5 THE COURT: You understand that. So to say that she  
6 just -- it just disappears from the whole system, and no  
7 one -- it's just gone, that's not true.

8 MS. HOFFMAN: No, Your Honor. And that's not what I'm  
9 suggesting. I very well understand that the Court has  
10 continuing jurisdiction and that this case will be  
11 continued to be heard in Washington.

12 But in the sense of how are we going to understand  
13 over the next many months how the child is doing in a  
14 completely new home with completely new people, that --  
15 there is a very, very weak remedy available because the  
16 home visit does not serve the purpose of a GAL evaluation.  
17 It is to see that the father has a sufficient home for the  
18 child.

19 If it works like an adoption home, uh, preplacement  
20 report does, it'll be to talk to the parents about, you  
21 know, what preparations they're making to get ready to have  
22 the child there, make sure that the child's going to a  
23 place where, you know, we can have reasonable assurance  
24 that she'll be adequately cared for.

25 And I don't think anybody's arguing that that's not

1 the case. I think what the Court -- what -- what is being  
2 argued is that the father has never parented the child. He  
3 did, by his own choice, although he would like to blame the  
4 other side of the family for that, not parent the child and  
5 not involve himself with the child. And he may very well  
6 be a fit parent, but we don't know that at this time.

7 And I'm not trying to shift the burden on the father,  
8 so much as I am pointing out that the mechanism that all of  
9 our authorities call for for determining whether or not a  
10 child is going to thrive or do well in an environment that  
11 the Court is considering or is actually placing her in, a  
12 Guardian ad Litem or a parenting evaluator has been taken  
13 off the table.

14 THE COURT: At this time.

15 MS. HOFFMAN: Well, yes. But that is the point of a  
16 temporary orders hearing. And if my clients go back -- or  
17 if -- if Leila's mother goes back and says, "I want a GAL"  
18 when it's already been asked for, how -- isn't it now the  
19 law of the case that a GAL's been considered and denied?  
20 How are we -- what remedy do -- does -- do my clients have;  
21 what remedy does Leila's mother have to have some oversight  
22 of what's going on with Leila once she gets down to  
23 California? There isn't one.

24 And so I think it's pretty clear that the Court's  
25 inclined to uphold the, um -- the decision, at least as far

1 as it goes to adequate cause. And clearly, you determined  
2 to uphold the temporary order. And your court -- the  
3 Court's articulated the reasons, and I do understand them.

4 But where I am really, truly not comprehending is the  
5 denial of a GAL. All it can do is serve this child's  
6 interests. Whether it goes the way the father wants it to  
7 or the way my clients want it to, that's unknown.

8 THE COURT: Here's the thing: You're arguing to me as  
9 if this was a divorce case, and as if the father and the  
10 grandparents are on equal footing, and the GAL's going to  
11 establish, you know, what's in the child's best interest.  
12 That is not the standard. It's not the father versus the  
13 grandparents. I venture to guess right now that, um, if  
14 that was the standard, the child would want to stay here.  
15 Her family is here; her friends are here; her school is  
16 here. Her whole life is here. That's not the standard.  
17 So --

18 MS. HOFFMAN: Your Honor --

19 THE COURT: -- that's where, um -- that's where the  
20 law is not on your side on this.

21 MS. HOFFMAN: Well, Your Honor, again, my argument is  
22 not best interests, it is not unfitness; it is with actual  
23 detriment. And my point is, I don't -- I think there is  
24 more than sufficient evidence for the Court to be concerned  
25 that placement with the father, which she's never lived

1 with the father, could be -- has a -- has a significant  
2 credible risk that it could be of actual detriment to her.

3 And that is what I'm talking about. I am not talking  
4 about best interest of the child. I am talking about if  
5 the Court decides that it is legally bound, as the Court  
6 indicates it believes, to find in favor of the father, that  
7 is one thing. But to say that, um, there should be no  
8 reason why there should not be a GAL, whether it's in the  
9 context of the non-parental, or in the context of the  
10 modification, which does apply a best interest standard, I  
11 just don't understand why the Court doesn't think that a  
12 GAL is appropriate.

13 THE COURT: Okay. Well, thank you, Counsel. I let  
14 you go quite a bit over. But I --

15 MS. HOFFMAN: I understand.

16 THE COURT: -- I kept you --

17 MS. HOFFMAN: Yes.

18 THE COURT: -- with my discussion. So not a problem.

19 MS. HOFFMAN: Thank you, Your Honor.

20 THE COURT: You bet. Thank you.

21 MS. BENNETT: May I approach the bench, Your Honor?

22 THE COURT: You can argue from wherever you'd like.

23 MS. BENNETT: The Petitioners must meet the burden of  
24 showing that both the parents are unfit, and that placing  
25 the child with either parent would result in that actually

1 detriment to the child. Otherwise, the adequate cause  
2 threshold hasn't been met.

3 Um, in this case, the Petitioners are alleging that  
4 placing the child with the father would result in actual  
5 detriment to the child, but they haven't produced any  
6 evidence of that. Um, we, uh, cited to the *Shields* case in  
7 our brief.

8 THE COURT: I read that.

9 MS. BENNETT: And, um, basically, the *Shields* case  
10 says that an unfit parent is generally one that can't meet  
11 the child's basic needs. And that a parent's conduct rises  
12 to the level of unfitness when the parent's fault or  
13 omission seriously effects the welfare of a child, the  
14 preservation of the child's freedom from serious physical  
15 harm, illness or death, or the child's right to an  
16 education and the like. They simply have provided no  
17 evidence that that's the case here.

18 The *Shields* case did analogize to, um, dependency  
19 statutes relating to the abuse and neglect of children and  
20 the, um, cases in that area of law.

21 RCW 13.34, which is the, um -- one of the dependency  
22 statutes, defines, um, who's dependent and may be removed  
23 from a parent's house. And here are the standards there:  
24 The child has been abandoned, is abused or neglected, as  
25 defined in the dependency statutes, um, by a person legally

1 responsible for the care of the child; has no parent,  
2 guardian or custodian capable of adequately caring for the  
3 child; um, is such that the child is in circumstances which  
4 constitute a danger of substantial danger (sic) -- or  
5 damage to the child's psychological or physical  
6 development, or is receiving extended foster care services.

7 Certainly, um, there's -- there's nothing like that in  
8 this case. Uh, no reason, either under the dependency  
9 statute or, um, under the standards in this case that the  
10 child, um, shouldn't remain in the -- the -- the custody of  
11 one parent or the other.

12 I believe we've thoroughly plowed the field that Ms.  
13 Siufanua is going to be going to jail shortly here, and is  
14 going to be in jail for, uh, probably at least 36 months,  
15 maybe longer. So at this point, she's just, uh, simply not  
16 available to care for the child.

17 Mr. Fuga is clearly a fit parent to care for the child  
18 at this time. He's married, with two younger sons, who are  
19 in school. And they are -- all of them are grounded in the  
20 church that they all attend as a family. He and his wife  
21 are financially stable, and they're able to provide the  
22 child with love and attention, and make sure she gets to  
23 school on time, ready to learn.

24 Um, the home inspection report did -- was done on  
25 Wednesday. And I just received, um, a copy of it. It is

1 very informal. Um, it's handwritten. But I did e-file it  
2 with the Court and, um --

3 THE COURT: I'm not going to view it now because it's  
4 something --

5 MS. BENNETT: Okay.

6 THE COURT: -- that's new. And I am constrained to  
7 the record below. But it has been filed, it sounds like.

8 MS. BENNETT: It has been. It has been.

9 THE COURT: I'm sure you've given copies to everyone,  
10 or are about to.

11 MS. BENNETT: I'm -- I'm going to. Yes, yes.

12 THE COURT: Okay.

13 MS. BENNETT: So that has been done. It's not like  
14 this child is falling into a black hole. She's going to be  
15 visiting, uh, with the grandparents. Uh, the order  
16 provides for time that she will be visiting with the  
17 grandparents on a regular basis.

18 THE COURT: The maternal grandparents, I assume, or  
19 the paternal?

20 MS. BENNETT: The -- the maternal grandparents.

21 THE COURT: Maternal, yes.

22 MS. BENNETT: As part of the order.

23 THE COURT: Right.

24 MS. BENNETT: And obviously, that's not something  
25 that, um, technically would have been under the Court's --

1 THE COURT: Actually, it's probably in violation of  
2 *Troxel* (phonetic).

3 MS. BENNETT: Yes. But --

4 THE COURT: But I thought that was a good ruling. And  
5 I think it's what needs to happen --

6 MS. BENNETT: Yes.

7 THE COURT: -- to provide, uh, for the continuity and  
8 the continuing relationship that is very important to the  
9 child.

10 MS. BENNETT: Exactly. And Mr. Fuga, because of the  
11 way he was treated by the mother and her parents, does not  
12 want that to happen in their case. He wants there to be  
13 continuing contact, visits. Um, I don't -- we don't know  
14 yet where Ms. Siufanua's going to be. And if it's possible  
15 to have visits there, and if it -- if that would be the  
16 best thing for the child, or whether they have Skyping  
17 facilities or whatever. But he's on board with making that  
18 happen, because that's an important, uh, relationship to  
19 her. And it would cause her more harm not to have whatever  
20 contact she can have during these next few years. So he's  
21 committed to doing that.

22 Also, the modification case continues. And so we have  
23 a temporary order in place.

24 THE COURT: Right.

25 MS. BENNETT: But there will -- the Court will

1 continue to oversee that. And so this child is not going  
2 to fall into a black hole, as -- as has been suggested.

3 There's simply no evidence that Mr. Fuga is in any way  
4 unfit to parent this child at this time. The allegations  
5 on which the Petitioners have based their request, um, for  
6 adequate cause simply aren't sufficient. And so we're  
7 asking because there's not adequate cause in this case,  
8 that the Commissioner's ruling dismissing the case be  
9 upheld.

10 THE COURT: Okay. Thank you, Counsel.

11 MR. EDWARDS: Good afternoon, Your Honor.

12 THE COURT: Good afternoon.

13 MR. EDWARDS: Um, real quickly, for the sake of  
14 clarity, when we called the case, um, we did it under the  
15 14-3 --

16 THE COURT: Oh, that's what was on here.

17 MR. EDWARDS: And I believe we've been consolidated  
18 under the 12-5.

19 THE COURT: Oh, okay.

20 MR. EDWARDS: And that's since the filing of that  
21 motion, so I understand why. But --

22 THE COURT: Oh.

23 MR. EDWARDS: -- our actual case number is 12-5-01550-  
24 4.

25 THE COURT: Okay, thank you for the clarification. I

1 had not seen that yet.

2 MR. EDWARDS: I just wanted to clarify the record  
3 there.

4 THE COURT: Sure.

5 MR. EDWARDS: Um, I'd like to -- I'll be relatively  
6 brief. There's -- there's no, uh, real hiding the ball  
7 that my client is in support of the mother's motion. Um,  
8 I'll speak first to the *Shields* case. I mean, in the  
9 *Shields* case, the actual detriment that was found -- the  
10 child at issue there was a deaf child, and the father did  
11 not know sign language. No one alleged that the father  
12 could not get the child to school, could not feed the  
13 child, could not put the child to bed. Um, the detriment  
14 that was going to result was an emotional detriment. It  
15 was going to be the fact that this father could not  
16 communicate with the child.

17 Um, and Ms. Bennett, uh, you know, cited a fair bit of  
18 *Shields* when she was up here. And one of the things that  
19 it looks to is, you know, whether there's fault or omission  
20 on the -- the parent that's at issue here.

21 And I would suggest that for the purposes of actual  
22 detriment, there is fault or omission on the part of Mr.  
23 Fuga in that he abandoned the child for a substantial  
24 number of years. It's his actions that created this void  
25 of an emotional attachment to the child.

1 THE COURT: But you would concede that that is highly  
2 disputed; that there is evidence in the record to support  
3 that the father made efforts to have a relationship with  
4 the child, but was rebuffed. And I'm using that, uh, in a  
5 soft way. The allegations are actually a little bit  
6 stronger than rebuffed. That the family was incredibly  
7 resistant to any efforts by the father to have any contact  
8 with the child.

9 MR. EDWARDS: Well, I --

10 THE COURT: So that's --

11 MR. EDWARDS: -- I concede that in part.

12 THE COURT: -- I'm not saying it's decided, but --

13 MR. EDWARDS: No.

14 THE COURT: -- it's in dispute, right?

15 MR. EDWARDS: I concede it in part, except that it was  
16 the mother and the maternal grandparents who took the child  
17 to California. The only time she's been to California and  
18 seen the father there was when they took her, voluntarily,  
19 not under any obligation.

20 And what we're talking about in terms of this  
21 rebuffing, it is a very recent thing, where the father just  
22 sort of appeared in Washington and said, "I'm here. Where  
23 are my rights? Where's my child?" And there is a history  
24 between these parties, between the family. And I argued  
25 this last week.

1 But I mean, I think that this hesitance is not without  
2 some justification because the last time they really had  
3 contact with him, um, was very near in time to these  
4 incidents of domestic violence.

5 So I'm -- I'm not going to say that they acted  
6 appropriately. Were I counseling at them at the time, I  
7 probably wouldn't have said, "Handle it this way." But I -  
8 - I don't think it's without, uh -- without reason. So  
9 I'll --

10 THE COURT: Okay.

11 MR. EDWARDS: -- leave that at that.

12 Um, when it comes to detriment, I mean, I think -- I  
13 believe I heard the Court say that, I mean, the -- the  
14 emotional detriment to a child is something that the Court  
15 could consider in determining whether this case should move  
16 forward with adequate cause.

17 I mean, what -- what we have at this point is a very  
18 confused little girl who's not, hopefully, having this  
19 explained to her in too much detail. But we also have the  
20 fact that she's only really had one primary caregiver ever.  
21 She's had, I argue, a couple people she's been bonded to.  
22 I'm sure she's bonded with her mother, because although she  
23 has been sort of in and out, there's clearly a bond there.  
24 Um, she clearly has a bond with the maternal grandparents.  
25 Um, each -- and then I'll say it's in dispute about the

1 paternal grandparents, because the amount of time they  
2 spent with her is also in question.

3 Um, the amount of time she spent with the father is  
4 not really in question. And I question whether it's enough  
5 to form an emotional bond. I mean, as I stood here last  
6 week, I -- I said that we've got a little girl who's  
7 expressing that she's afraid of being struck where she is  
8 now. And then subsequently, she's expressing that she's  
9 getting in trouble for saying she's afraid of being struck.  
10 These are the sorts of things the Court will hear nothing  
11 about if we don't have an evaluator, which I don't think  
12 we're going to have if we don't move forward with the non-  
13 parental custody action.

14 Um, on the issue of the home study, obviously, none of  
15 us have seen it. I've already -- I argued last week about  
16 why I, uh, feel it may not be adequate. There are concerns  
17 that the father may be moving into his own house. Then  
18 we've got a completely invalid home study.

19 Um, I'm also -- just going through my notes from Ms.  
20 Hoffman speaking on her comments. But as far as the -- you  
21 know, I -- I guess I'm, in essence, alleging abandonment,  
22 which does create this sort of detriment to the child. Um,  
23 and the Court pointed out that he made efforts to  
24 reconnect. He did make those efforts. But I would suggest  
25 to the Court that they are very close in time with the

1 financial obligation that was put upon him by the State as  
2 well. Um, and that may or may not have bearing on this.

3 But ultimately, I just have to disagree with the Court  
4 that this child is not going to fall into a black hole.  
5 Because the Court will absolutely have oversight, but we're  
6 not going to get an evaluator down the road without a  
7 showing of a substantial change in circumstances. And I  
8 don't know how we'd get that with no one knowing what's  
9 happening in California. There will be limited visitation.  
10 But I think there's going to be -- if I'm remembering the  
11 temp order, there will be one visit between now and trial.  
12 Maybe two. There might be two. But that's really the only  
13 contact we're going to have. And we don't even know  
14 exactly what that's going to be, at least in terms of my  
15 client, because we don't know where she's going to be.

16 So I disagree that if we do not move forward with the  
17 non-parental custody action or with some sort of evaluator,  
18 um, the Court's never going to hear two sides about this  
19 child for the rest of this case.

20 Um, unless the Court has any other questions, I'll  
21 leave it at that.

22 THE COURT: Thank you, Counsel.

23 MR. EDWARDS: Thank you.

24 THE COURT: Ms. Hoffman, do you want to exercise your  
25 couple minutes?

1 MS. HOFFMAN: Your Honor, I just want to once again  
2 point out that it seems like the prongs of the -- the test  
3 for adequate cause for non-parental custody are being  
4 conflated. And I think that I just -- I guess for the  
5 record, feel the need to clarify again, that it is  
6 unfitness or actual detriment.

7 And when the Court issued its opinion in *Shields*, Ms.  
8 Harwood, who was the child's biological mother -- the  
9 child's only living biological parent by the time the case  
10 was there, was fit. She had visitation with the child.  
11 She had more visitation with the child than Mr. Fuga has  
12 had with Leila.

13 And the same goes for the parents in the *Allen* case,  
14 which is actually what Mr. Edwards was referring to with  
15 the case involving the deaf child.

16 Both of those parents were fit. They weren't even  
17 maybe necessarily bad parents. But where the detriment  
18 came in *Shields*, and what the Court said, was that the  
19 detriment came from removing the child from the people who  
20 had been the primary caregivers. And that was in the case  
21 of *Shields*, stepmother. And it was in the case in *Allen* as  
22 well.

23 And nowhere did anyone allege that in making the very  
24 natural supposition that removing a child from the only  
25 home they've ever lived in, or the home they've lived in

1 for a big part of their lives, will cause actual detriment,  
2 shifts a burden.

3 The fact is is that the Court, I guess you could say,  
4 presumed that when a child has been raised by someone and  
5 lived in a home environment with a family unit for most of  
6 their lives, that the risk of actual detriment there is  
7 sufficient to trump an otherwise fit -- and that is the  
8 term that the Court used -- "otherwise fit" parent's  
9 Constitutional right.

10 And the reason for that is that although Mr. Fuga does  
11 have a right to have a relationship with his child, and  
12 there are many options available to the Court to let him  
13 exercise that right, the interest -- the State's interest  
14 and the welfare of a child trumps that right.

15 And that is basically what this case is about is the  
16 fact that this is a little girl who has lived in one family  
17 unit that is still available to her, who is being taken out  
18 of that environment very quickly. And as both Mr. Edwards  
19 and I have probably hammered on more than you wish to hear,  
20 but both believe very strongly, not sufficient oversight  
21 for this child. Um, and that is -- that is all I have to  
22 say, Your Honor.

23 THE COURT: Okay. Thank you all. Um, thank you for,  
24 um, your very good presentations here today, and also for  
25 the written materials.

1           Having reviewed everything that's been submitted, and  
2 heard from the parties, I really understand the issues  
3 here, um, and the, uh, differences of interpretation of the  
4 various statutes and case law. But I do not find any  
5 reason to revise Commissioner Zinnecker's ruling in this  
6 case. I'm going to affirm it.

7           Um, and if anyone has an order, maybe one was  
8 submitted to me. Did you submit one, Ms. Bennett?

9           MS. HOFFMAN: I have an order, and I'm sure it was  
10 submitted.

11           THE COURT: Okay. Okay, thank you. Okay, I have  
12 signed the Order. Thank you all for your time today. And,  
13 um, I will -- we'll have, um --

14           (END OF RECORDING)

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

